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BEYOND THE WARREN COURT AND ITS CONSERVATIVE CRITICS: TOWARD A UNIFIED THEORY OF CONSTITUTIONAL CRIMINAL PROCEDURE

Donald A. Dripps*

For at least twenty years, most popular, political, and scholarly commentary about constitutional criminal procedure has taken the form of a debate between defenders and critics of the Warren Court. I shall refer to defenders of the Warren Court criminal procedure decisions as liberals, and to critics of these cases as conservatives.¹ I shall argue that the contending camps subscribe to inconsistent premises, that neither set of premises is entirely satisfactory, and that a revised version of conservative premises has the potential to support a comprehensive and coherent theory of constitutional criminal procedure. It turns out, however, that the regime suggested by these revised conservative premises greatly resembles the body of doctrine laid down by the Warren Court.

The liberal perspective recognizes the necessity of enforcing the criminal law.² But the liberal perspective qualifies that

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1. I resort to these labels with some awareness of their potential for misrepresentation. We live at a time when the "conservatives" in China and the Soviet Union are doctrinaire Maoists and Bolsheviks, respectively. But the persistence of these terms offers powerful evidence of their utility, if not necessity. Cf. R. ROTUNDA, *THE POLITICS OF LANGUAGE: LIBERALISM AS A WORD AND SYMBOL* (1986) (tracing use of "liberal" label in modern political history).

2. An extensive literature compares and contrasts the approaches of the Warren and Burger Courts to criminal procedure. Two thoughtful and provocative examples are Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185 (1983); and Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 *COLUM. L. REV.* 436 (1980). The seminal contribution to the literature on conservative and liberal models of criminal procedure is H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153-246 (1968). Other comparisons of the liberal/Warren Court and the conservative/Burger Court perspectives include Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 77 *MICH. L. REV.* 1319 (1977); Kamisar, *The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Was It Really So Prosecution-Oriented?), and Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62 (V. Blasi ed. 1983); Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal*

necessity by affirming the values of individual autonomy and equality among persons, values that frequently compete with law enforcement. The Warren Court identified these latter values in the due process clause of the fourteenth amendment, compelling respect for autonomy and equality from legislative majorities that for decades had remained indifferent to police excesses and unimpressed by egalitarian considerations.³

The modern conservative perspective on criminal procedure evolved in reaction to the Warren Court decisions in *Mapp*,⁴ *Gideon*,⁵ *Escobedo*,⁶ *Miranda*,⁷ and *Massiah*.⁸ This perspective's fundamental premise is that rational criminal procedure should have the primary object of determining the truth of a criminal charge. The dissenters in the Warren Court landmarks typically linked this premise with the importance of precedent as a constraint on the legitimate authority of the Court. But now that the sea changes of the sixties have become venerated precedents themselves, conservative commentators have adopted a distinct but related premise regarding legitimacy. This premise holds that the federal courts ought to construe the fourteenth amendment according to the intentions of its framers.⁹ Contemporary conservatives believe that this premise complements the

Procedure in the Warren and Burger Courts, 69 GEO. L.J. 151 (1980); Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U.L.Q. 11 (1988); Weisberg, *Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832 (1985); see also Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

3. The concern for equality is probably the single most salient distinction between the Warren Court and its predecessors and successors. This distinctive concern seemed for a time destined to make the equal protection clause the centerpiece of constitutional criminal procedure. See *Douglas v. California*, 372 U.S. 353 (1963) (state that provides representation for the indigent must furnish representation on appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state may not deny indigent defendant free transcript for purposes of preparing appeal). But the Court stopped short of declaring poverty a suspect classification. The universally approved decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), rested not on the equal protection clause but on the due process clause. Ultimately, the Court settled upon a doctrine that set a constitutional minimum of procedural protection even for the poor, without denying a more elaborate defense to those who can afford one.

4. *Mapp v. Ohio*, 367 U.S. 643 (1961).

5. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

6. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

7. *Miranda v. Arizona*, 384 U.S. 436 (1966).

8. *Massiah v. United States*, 377 U.S. 201 (1964).

9. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986), reprinted in 22 U. MICH. J.L. REF. 573 (1989) [hereinafter REPORT NO. 2, SEARCH AND SEIZURE].

primacy of truth finding, because they ascribe intentions to the framers that for the most part leave criminal procedure to the determination of the political process. Conservatives therefore oppose freeing the guilty as a remedy for government violations of autonomy or equality.¹⁰

By focusing on the Warren Court's casual attitude toward constitutional interpretation in criminal cases, and on the primacy in criminal procedure of determining guilt and innocence, the conservative perspective captures some important truths. Indeed, conservatism enjoys judicial ascendancy, not just on the Supreme Court, but with few exceptions in the lower federal courts and in their state counterparts as well. I shall argue, however, that the conservative perspective in its prevailing form is deeply flawed.

Specifically, I shall claim that invoking the intentions of the framers is a problematic basis for constitutional criminal procedure. Indeed, the conservative perspective admits as much by deploying the primacy of the truth-finding function, nowhere mentioned in the constitutional text and never articulated in the legislative history, as a guide to constitutional adjudication. I shall argue that in constitutional terms the relevant value is not finding the truth but preventing unjust punishment. Prevailing conservative thought not only mischaracterizes this value, but also refuses to promote it outside the narrow confines of the criminal trial. Yet the methods of criminal investigation—arrest, search, and interrogation—in effect can punish innocent people the government never charges, let alone tries. The central meaning of due process forbids punishment without trial, a prohibition that speaks primarily to state action that does *not* culminate in a trial.

Constitutional criminal procedure instead should assume for its premises the preference for avoiding unjust conviction and the neutral application of the same conventions of interpretation that the justices bring to bear on other issues of constitutional law to the due process clause in criminal cases. These premises differ only subtly from their conservative counterparts, but projected far enough a difference of a few degrees can result in a tremendous divergence. Those who accept these latter premises, including many who call themselves conservatives, are likely to approve most of the Warren Court

10. See *id.* at 578.

decisions that present conservatives condemn.

Part I develops more fully the differences that divide liberal and conservative commentators on criminal procedure, taking special note of the series of Reports prepared by the Justice Department's Office of Legal Policy and published recently in the *University of Michigan Journal of Law Reform*.¹¹ Part II explains my disquiet with the suggestion that original-meaning jurisprudence ought to guide criminal procedure doctrine. Part II also defends the thesis that the fourteenth amendment protects the individual interest in freedom from unjust punishment, rather than any abstract interest in truth for its own sake. Part III considers two familiar controversies in criminal procedure—the fourth amendment exclusionary rule and confessions—from the revised perspective developed in Part II. Part IV adumbrates some possible applications of the revised perspective to trial procedure. These possibilities illustrate that the risk of unjust punishment remains very far from irreducible, and that the fourteenth amendment authorizes measures to move this risk closer to its practical minimum.

What emerges is more than a critique of modern conservative thinking about criminal procedure. If we adopt the revised premises I propose, we will understand as we have not before why due process has implications for police practices as well as for trial procedure. We will understand as we have not before that the guilty should go free only when the protection of the innocent requires this result. And we will understand, perhaps with the disappointment that comes from living in an imperfect world, that principled constitutionalism permits what the security of the innocent requires—limits on the enforcement of the criminal law very much like those set by the Warren Court.

I. THE CONSERVATIVE PERSPECTIVE ON CONSTITUTIONAL CRIMINAL PROCEDURE

The conservative school of thought regarding criminal procedure had its precursor in Bentham,¹² its founder in

11. *Truth in Criminal Justice Series*, 22 U. MICH. J.L. REF. 437 (1989).

12. See, e.g., J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827).

Wigmore,¹³ and a gifted, although on the Supreme Court level out-voted, generation of exemplars in Harlan,¹⁴ Friendly,¹⁵ Barrett,¹⁶ Bator,¹⁷ Vorenberg,¹⁸ Inbau,¹⁹ and Oaks.²⁰ Today its prominent advocates include Chief Justice Rehnquist,²¹ Justices White²² and Scalia,²³ and academics such as Joseph Grano²⁴ and Gerald Caplan.²⁵

Of course, not all of these individuals agree about every issue in criminal procedure. They share, however, a common perspective that emphasizes the primacy of truth-finding among the functions of the criminal trial and the primacy of the framers' intentions in constitutional interpretation.²⁶ The conjunction of these premises is not inevitable: Bentham, for example, cared deeply about the truth-finding function and, naturally enough, not at all about the intentions of the framers.²⁷ Wigmore too gave priority to truth finding, but you will not find much about the founders' intentions in the work of that master of the common law.²⁸ Not until the

13. See, e.g., 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2250 (1st ed. 1905) (arguing that the fifth amendment should be construed narrowly); 4 J. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2184 (2d ed. 1923) (arguing that the fourth amendment exclusionary rule based on "misguided sentimentality" leads to "coddling the criminal classes").

14. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 504 (Harlan, J., dissenting).

15. See, e.g., Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

16. See, e.g., Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962).

17. See, e.g., Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62 (1966).

18. See, e.g., *id.*

19. See, e.g., Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16 (1961).

20. See, e.g., Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

21. See, e.g., *Illinois v. Gates*, 462 U.S. 213 (1983).

22. See, e.g., *id.* at 246 (White, J., concurring).

23. See, e.g., *Duckworth v. Eagan*, 109 S. Ct. 2875, 2881 (1989) (O'Connor, J., concurring). Justice Scalia joined Justice O'Connor's opinion, which denied the cognizability of *Miranda* claims on federal habeas corpus.

24. See, e.g., Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

25. See, e.g., Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985).

26. This perspective is also presented in REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 575.

27. See generally J. BENTHAM, *supra* note 12.

28. See *supra* note 13. Wigmore urged a narrow construction of the fifth amendment not because the founders intended that construction but because that

Supreme Court interpreted the Constitution to require the frustration of the truth-finding mission in state criminal trials did the conservative perspective emerge in its modern form.

Modern conservatism evolved in the dissenting opinions in *Mapp*, *Escobedo*, *Miranda*, and *Massiah*. In *Mapp*, Justice Harlan's dissent relies on the probative value of illegally seized evidence, the constitutional importance of federalism, and *stare decisis*.²⁹ Likewise, Justice White's dissent in *Massiah* emphasizes the truth-finding function and precedent, without discussing the intent of the founders:

The current incidence of serious violations of the law represents not only an appalling waste of the potentially happy and useful lives of those who engage in such conduct but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow. . . .

It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible.³⁰

The connection with the framers' intentions, however, was not long in coming.

Only five weeks later, dissenting in *Escobedo*, Justice White questioned the legitimacy, as well as the wisdom, of excluding probative evidence. The loss of evidence was indefensible because "[n]either the Framers, the constitutional language, a century of decisions of this Court nor Professor Wigmore

construction made sense as a matter of policy. His critique of the fourth amendment exclusionary rule included historical dimensions, but again Wigmore saw the "essential fallacy" of *Boyd v. United States*, 116 U.S. 616 (1886), and *Weeks v. United States*, 232 U.S. 383 (1914), as the disregard of the common-law principle that no trial should become an inquest into collateral matters. 4 J. WIGMORE (2d ed.), *supra* note 13, at § 2184.

29. *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

30. *Massiah v. United States*, 377 U.S. 201, 207-08 (1964) (White, J., dissenting).

provide[d] an iota of support” for the majority’s approach.³¹ White argued that *Escobedo* fashioned, not constitutional law, but a “new American judges’ rule.” In his view, *Escobedo* demonstrated that even judges “can make mistakes and exceed their authority.”³² In the final paragraph of his dissent, Justice White deployed the conservative approach in modern form. Law enforcement, although not yet “destroyed by the rule announced today,” would nonetheless “be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.”³³

The *Miranda* dissenters adopted a similar posture. Justice Harlan wrote that the Court’s holding “require[d] a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains.”³⁴ For Justice White, constitutional interpretation necessarily entailed making new law based on policy choices. But notwithstanding this concession, Justice White dissented in part because the majority approach had “no significant support in the history of the privilege or in the language of the Fifth Amendment.”³⁵ In any event, “[e]qually relevant” as text and history “is an assessment of the rule’s consequences measured against community values.”³⁶ On this score the frustration of the truth-finding function should have foreclosed the majority’s textual exegesis, for “[p]articularly when corroborated . . . confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty.”³⁷

Time has not diminished the value of determining the truth at trial or the importance of legitimacy in making constitutional law. The conservative school continues to rely on these values. But legitimacy has assumed for conservatives a more rigid meaning than it did for Justices White and Harlan. Indeed, the conservative positions of the 1960s and those of the 1980s differ most obviously in that contemporary conservatives deny what Justices Harlan and White admitted, namely,

31. *Escobedo v. Illinois*, 378 U.S. 478, 497 (1964) (White, J., dissenting).

32. *Id.* at 498-99 (White, J., dissenting).

33. *Id.* at 499 (White, J., dissenting).

34. *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

35. 384 U.S. at 526 (White, J., dissenting).

36. *Id.* at 537 (White, J., dissenting).

37. *Id.* at 538 (White, J., dissenting).

that the intent of the framers is only one component in legitimate constitutional interpretation.³⁸

In this regard the Justice Department's Office of Legal Policy has provided a good illustration of modern conservative thinking in its *Truth in Criminal Justice Series*.³⁹ The very title of the series suggests the continuing value placed on discovering the truth at trial, even if it also hints at the need to dispel ideological disinformation spread by liberal law professors and the like. The Attorney General's preface to the Reports asserts that "the criminal justice system must be devoted to discovering the truth."⁴⁰ Each of the Reports criticizes prevailing criminal procedure doctrine for keeping relevant evidence from the trier of fact. But the Reports give priority to the intentions of the framers and not to the value of the truth-finding mission.

For example, the first of the Reports urges the overruling of *Miranda* because that decision's "promulgation of a code of procedure for interrogations constituted a usurpation of legislative and administrative powers, thinly disguised as an exercise in constitutional exegesis"⁴¹ The Report assigns only secondary priority to the contention that *Miranda* "impairs the ability of the government to protect the public."⁴² The second Report likewise criticizes the fourth amendment exclusionary rule as follows:

First, the rule has no support in the "original intent or meaning" of the Framers of the Constitution. Second, the validity of the rule's deterrence rationale has yet to be demonstrated. Third, among its other drawbacks, the rule impairs significantly the search for truth in criminal justice. Finally, alternative methods for deterring and redressing fourth amendment violations exist or could be created, and those alternatives would be more effective and less costly than the exclusionary rule.⁴³

38. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 591-94.

39. 22 U. MICH. J.L. REF. 437 (1989).

40. Meese, Introduction to OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES (1986-88).

41. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986), reprinted in 22 U. MICH. J.L. REF. 437, 543 (1989) [hereinafter REPORT NO. 1, PRETRIAL INTERROGATION].

42. *Id.*

43. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 575.

Only where the rules obstructing the search for truth are not founded on the Constitution do the Reports place primary emphasis on truth.⁴⁴ Indeed, one Report concludes that the original understanding of the Constitution requires the frustration of the truth-finding function.⁴⁵

This shift in priority is no accident; the modern emphasis on the framers' understanding is necessary if the Warren Court precedents are to be overruled. The Warren Court dissenters had precedent on their side, and they could deploy the value of the truth-finding mission as a powerful reason to refrain from decisions of doubtful legitimacy. Modern conservatives now confront the Warren Court decisions as settled precedents, and legal method requires that the conservatives assign some authority higher than precedent to justify departing from it.

Professor Grano, in his introduction to the reissue of the Reports, makes the conservative program explicit. In his view, the Reports have the attractive potential "to foster the intellectual environment that will inspire the Rehnquist Court to undertake the much needed fundamental critique of the status quo" in criminal procedure.⁴⁶ Original meaning jurisprudence would provide the point of attack against Warren Court precedents. Once those be interred, "[t]he first step in any fundamental reexamination of the existing order should involve an evaluation of the importance of truth discovery relative to other goals the system might have."⁴⁷ Naturally, "discovery of truth must be primary," but not "the only desideratum."⁴⁸

It would not be unfair to ask why original-meaning jurisprudence loses its priority when the subject is preventive detention rather than *Miranda*, or more generally why original-meaning jurisprudence trumps the Warren Court

44. See, e.g., OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 4, REPORT TO THE ATTORNEY GENERAL ON THE ADMISSION OF CRIMINAL HISTORIES AT TRIAL (1986), reprinted in 22 U. MICH. J.L. REF. 707 (1989) [hereinafter REPORT NO. 4, CRIMINAL HISTORIES].

45. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 6, REPORT TO THE ATTORNEY GENERAL ON DOUBLE JEOPARDY AND GOVERNMENT APPEALS OF ACQUITTALS (1987), reprinted in 22 U. MICH. J.L. REF. 831 (1989).

46. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 402 (1989).

47. *Id.*

48. *Id.* at 403.

precedents but the regime to be built on their ashes is to be governed by a policy preference for truth rather than an historical assay of the due process clause. It also might be fair to wonder if the Reports do not object to selective incorporation, the least historically defensible Warren Court doctrine, because their authors wish to dilute constitutional limits on federal power in the name of federalism.⁴⁹ But notwithstanding these embarrassing questions, the conservative position has some attractive components, advanced by effective advocates. Answers to their arguments are not to be found in the opinions of the Warren Court majorities. Indeed, if their premises be granted, I do not think their arguments can be answered at all.

II. WHAT'S RIGHT, AND WRONG, WITH THE CONSERVATIVE PREMISES

The relation between the two premises of conservative thinking about criminal procedure makes sense, if you take conservative rhetoric at face value. When the Constitution, construed as its framers intended, does protect a value that competes with the truth-finding function, conservatives admit that original intent has priority over their policy preference for truth. They claim only that Warren Court doctrine lacks a legitimate basis in the Constitution and therefore has the compound defect of illegitimately imposing bad policy.⁵⁰

This conservative critique of the Warren Court's criminal justice decisions has considerable force. It is hard to deny that some of these decisions reflect a casual attitude toward the constitutional text, its historic meaning, and *stare decisis*.⁵¹

49. Cf. *Williams v. Florida*, 399 U.S. 78, 129-36 (1970) (Harlan, J., dissenting) (stating that selective incorporation in practice tends to dilute federalism).

50. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 591-602.

51. In the words of a sympathetic critic:

It is important, however, not to canonize the Warren Court and not to regard its works as sacrosanct. It was often wrong and wrongheaded. It frequently failed to articulate its decisions adequately and sometimes appeared to doubt the importance of adequate articulation. It was frequently self-righteous and intolerant of competing considerations. At times it flouted the Court conventions when adherence to them would have cost little and might have marshalled greater support for the innovations it was effecting. Strangely enough, one of the most serious criticisms of the Court is that often, having embarked upon a

At the same time, truth in adjudication is an important value.⁵² So in at least some cases, the conservatives can fairly charge the Warren Court not only with imposing policy preferences in the guise of constitutional law, but with imposing the wrong policy preferences as well.

The *sine qua non* of Warren Court doctrine was the incorporation into the fourteenth amendment's due process clause of the specific rights enumerated in the first eight amendments. For a time Justice Black and Justice Frankfurter debated the former's total incorporation thesis according to familiar canons of constitutional interpretation.⁵³ But in *Mapp*, *Gideon*, and *Malloy*⁵⁴ the fourteenth amendment does not seem to be the object of discussion. One may approve or condemn the holdings, but the majority opinions leave the impression that their authors believed that nothing further could be said on the subject of incorporation, and wrote only to report a change of votes. From the standpoint of conventional constitutional interpretation, there was something to be said for fundamental fairness, and something to be said for total incorporation; but what the Warren Court served up was a selective incorporation doctrine for which, at least in conventional terms, almost nothing could be said.

Miranda depends on *Malloy*; *Massiah* depends on *Gideon*; and *Aguilar*⁵⁵ and *Terry*⁵⁶ depend on *Mapp*. The foundations of modern constitutional criminal procedure doctrine therefore rest on intellectual landfill. Although this does not establish that the conservatives are right, it does establish the importance of their project. For by insisting on legitimacy in constitutional adjudication of criminal cases, and by appealing to the truth-finding value as a policy consideration to resolve

problem it did not go far enough.

Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539-40 (footnotes omitted).

52. In every legal tradition, discovering the truth is at least one of the important goals of the criminal trial. See Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (examining the priority of the truth-finding function in common-law, civil-law, and socialist legal systems).

53. See, e.g., *Adamson v. California*, 332 U.S. 46 (1947).

54. *Malloy v. Hogan*, 378 U.S. 1 (1964).

55. *Aguilar v. Texas*, 378 U.S. 108 (1964) (two-pronged test for determining probable cause based on confidential informant).

56. *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion standard applies to decision to stop suspect on the street; inquiry into the reasonableness of search-and-seizure activity is the touchstone of the fourth amendment).

ambiguities in constitutional authority, the conservatives offer an account that demands a response. If the Warren Court regime is to endure, its contemporary defenders must offer stronger arguments than those that appear in the majority opinions in *Mapp*, *Miranda*, and *Massiah*. This defense can be made, but only by questioning the premises of the conservative approach.

A. *Questioning Originalism in
Constitutional Criminal Procedure*

By appealing to the historic meaning of the Constitution, the conservatives have moved the debate about criminal procedure away from the specialized concerns of criminal-law professionals and into the domain of constitutional theorists. The conservatives rightly criticize the Supreme Court's habit of deciding criminal cases under the fourteenth amendment as though the justices held some supervisory power over state prosecutions. Perhaps in criminal cases the Court's institutional competence achieves its zenith, but competence requires legitimate authority before it becomes binding, and the state courts, being closer to the subject, have at least as much in the way of institutional competence as their federal overseer. In fairness, the tendency to ignore traditional tests of constitutionality in criminal cases has outlived the Warren Court,⁵⁷ but that does little to rehabilitate *Mapp* and *Miranda*.

If the conservatives have properly removed the contest to the field of constitutional theory, they seem unaware of how large that field has become. Nowadays it is not enough to say "intent" and then cite the usual secondary sources for the usual conclusion that it is not certain that the framers intended the exclusionary rule or pre-interrogation warnings. Constitutional theory is itself problematic, so the conservatives have set course not for a safe haven but for the most open of stormy intellectual seas.⁵⁸

57. See, e.g., *Williams v. Florida*, 399 U.S. 78 (1970) (holding that a six-person jury is constitutional); *United States v. Salerno*, 481 U.S. 739 (1987) (holding that preventive detention is constitutional).

58. The literature on constitutional theory is vast, perhaps tumescent. But no one interested in law could fail to profit from reading any sample that includes J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY,

Like originalists in the more general debates about constitutional interpretation, the conservatives make the plausible argument that noninterpretative judicial review is antidemocratic and therefore illegitimate. What the conservatives do not explain, and what their allies in the more general debate likewise do not explain, is why originalist judicial review *is* legitimate, even though it too is antidemocratic.⁵⁹

The most plausible attempt links the legitimacy of interpretive review to an artificial notion of consent. "We the people" consented to the terms of the Constitution when "we" ratified the instrument and its amendments. But this is sheer fiction; you and I could not consent to anything in 1868 or 1789, and nobody has asked our consent more recently.⁶⁰ Blacks and women did not even have enfranchised predecessors-in-interest.

What most of us have accepted, what most of us invoke when we claim the protection of the Constitution, is not the instrument interpreted historically, but the instrument interpreted judicially. Judicial interpretation most emphatically does not mean interpreted with the same freedom with which we might suppose that Derrida reads Empson, but it just as surely does not mean interpreted historically. I am not an historian, but very strong cases can be made that the post-New Deal commerce clause cases and *Brown v. Topeka Board of Education*⁶¹ contravened the intentions of the framers.⁶² If the bulk of the government's domestic activity, activity on which the commitments of whole generations rely, is not unconstitutional, it is necessary for more than the

DEMOCRACY AND DISTRUST (1980); M. TUSHNET, RED, WHITE AND BLUE (1988); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

59. See Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1261 (1984) ("The debate over judicial review must be shifted to fairer grounds. First, it must acknowledge that *all* judicial review is antimajoritarian and that it is useless and dishonest to criticize noninterpretive review as being uniquely antidemocratic."); Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CALIF. L. REV. 1482 (1985) (surveying standard arguments for legitimacy of interpretive review).

60. Thus, Ely admits that the interpretive theory is "largely a fake," even though he defends his own representation-reinforcing approach as "the ultimate interpretivism." J. ELY, *supra* note 58, at 11, 87-88.

61. 347 U.S. 483 (1954).

62. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY 117-33 (1977); Grey, *supra* note 58, at 710-14.

intentions of the framers to count as valid sources of constitutional law. Bluntly put, originalism is not the law.

The hard part consists of saying just what does count as constitutional law, once we admit what we practice and deny the decisive importance of the original understanding. This is a large question indeed, and I have taken it up in some dubious work-in-progress.⁶³ For present purposes I can follow the conservative lead and simply describe a constitutional theory without justifying it. It is my belief that the Constitution ought to be interpreted according to conventional authorities; that these authorities can be discovered by examining prior political decisions, especially judicial decisions; and that political decisions have affirmed the authority of the constitutional text, its historic purposes identified at a high level of generality, and precedents. When these authorities do not propound in one direction or another, considerations of policy have determined the result.

My foray into constitutional theory may not persuade anyone. *But any constitutional theory that does not demand the overthrow of the welfare/regulatory state, the rescision of first amendment rights against the states, and the reversal of the constitutional proscription of racial segregation must come to something like the same approach.* Given that the original understanding has not constrained constitutional interpretation on crucial issues, the constraints on constitutional interpretation are more vague than originalists suppose.⁶⁴ Either that, or there are no constraints. One could take the manifest disregard of original intent in practice as a warrant for the critical legal studies conclusion that law is only power, much as a fundamentalist Christian might take Darwin as a warrant for atheism.

Those who study criminal procedure are not likely to elide the principled alternatives for constitutional interpretation between rigid originalism and unconstrained judicial discretion. Whoever reads criminal procedure cases realizes that *because of doctrine* real people face massive consequences. *Because of doctrine*, one murderer goes free to kill again and another one is executed. So doctrine matters, but its constraints are subtle and so rooted in policy that the two seem

63. D. Dripps, Political Obligation and Constitutional Law (unpublished manuscript, on file with author).

64. See Simon, *supra* note 59.

much the same.

On the level of theory, students of criminal procedure would do well to revisit the *Miranda* dissenting opinions. Justice Harlan conceded that “pragmatic concerns” on occasion could justify straining “history and precedent.”⁶⁵ And modern conservatives should consider the words of Justice White:

That the Court’s holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today’s decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court’s text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part.⁶⁶

Much more could be said on the subject of constitutional

65. *Miranda v. Arizona*, 384 U.S. 436, 505 (Harlan, J., dissenting).

66. *Id.* at 531-32 (White, J., dissenting) (footnote omitted).

theory, but for the purposes of criminal procedure it should suffice to conclude that the appeal to originalism could not bring down the Warren Court criminal cases without also bringing down much else of greater value than, say, the right result on the exclusionary rule issue.

*B. Qualifying the Pursuit of Truth
as the Primary Value in Criminal Procedure*

From the foregoing discussion one might conclude that I think constitutional criminal procedure is pure policy. That is far from the case, and in what follows I shall rely on authority far more than on unconstrained notions of policy. I agree with the conservatives that authority has logical priority over policy; but because for many, at least psychologically, this priority is reversed, I would like to discuss the value of truth finding as a matter of pure policy. Ultimately I shall argue that a particular, and morally justified, policy program is authoritatively affirmed by the due process clause and the cases construing it. My interpretation of authority will be more persuasive if skeptical readers first consider some qualifications on the value of truth-finding quite aside from doctrinal constraints.

I am, as some might suspect from my critique of the privilege against self-incrimination,⁶⁷ sympathetic to the truth-finding mission of criminal procedure. I also believe that formal procedure has only instrumental value.⁶⁸ Previous critiques of the conservative focus on truth finding have not

67. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988).

68. Some distinguished commentators have defended the value of formal procedure for its own sake in the context of the Supreme Court's administrative-entitlement, due process cases. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1493 (1968); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS 126 (1977) (Nomos XVIII, Yearbook of the Am. Soc'y for Pol. & Legal Phil.). Nonetheless, the courts have consistently refused to recognize a constitutional right to procedure divorced from any constitutionally protected substantive interest, and the balance of arguments seems to support that conclusion. *E.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); see also Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 674-75; Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 115-118.

disturbed these biases. Professor Arenella correctly points out that most criminal trials call upon the jury to make normative as well as positive judgments about the defendant's conduct.⁶⁹ He does not, however, explain how the exclusion of probative evidence enhances the jury's normative judgments.

Professor Seidman condemns the conservatives for not taking the truth-finding function as the *sole* goal of adjudication.⁷⁰ He objects to grafting consequentialist goals onto the criminal process because of the disrespect for individuals implicit in deciding a criminal case on any basis other than the defendant's blameworthiness.⁷¹ This critique of the conservative emphasis on truth as hypocritical rhetoric is, I think, mistaken. According to Professor Seidman's argument, a sincere commitment to truth as a value in adjudication must place truth in adjudication as the supreme value, for any constraint on the truth-finding function amounts to "social engineering" to achieve extraneous ends.

No one, not even Professor Seidman,⁷² places this ultimate value on truth in adjudication. Kantians and utilitarians alike admit the value of privileges and the constraints of time and resources. Indeed, to value truth in *adjudication* at the expense of truth when punishment is imposed outside the adjudicatory context is incoherent.⁷³ To criticize conservatives or liberals for admitting the competition of truth with other values fails to recognize that the value placed on truth is measured against other values we are willing to sacrifice for it. That the conservatives place primary, not exclusive, value on truth does not establish either inconsistency or identity of position with their liberal antagonists.

So I am skeptical about much of what others have said

69. See Arenella, *supra* note 2, at 197-98.

70. See Seidman, *supra* note 2. The gist of Professor Seidman's argument is that "the Burger Court's criminal procedure decisions are not consistent with a guilt-or-innocence model" because "the Court has continued to use the criminal justice system as a tool for social engineering, even when this pursuit of broad social goals conflicts with the need to reach factually reliable judgments in individual cases." He objects to this continuing "habit of treating criminal defendants as bit players in a larger social struggle." *Id.* at 437.

71. *Id.* at 501-03. Professor Seidman's analysis in this respect closely resembles the stimulating discussion of "Expressive Aspects of Criminal Procedure" found in C. FRIED, *AN ANATOMY OF VALUES* 125-32 (1970).

72. Professor Seidman concludes his article by questioning both the possibility and the desirability of exclusive devotion to truth in adjudication. See Seidman, *supra* note 2, at 502-03.

73. See *infra* text following note 83.

against the conservative's focus on the value of truth finding at trial. But conservatives make two mistakes in describing the precise form of truth seeking that has value in the criminal process: first, they fail to discriminate false convictions from false acquittals; second, they limit the primacy of the truth-finding function to formal proceedings.

Conservatives appeal to truth finding almost exclusively in the context of criticizing doctrines that result in the acquittal of persons known to be guilty. With the peculiar exception of the self-incrimination privilege, however, these doctrines have the purpose of insulating the innocent from punishment.⁷⁴ Frequently, and almost always if analysis is restricted arbitrarily to the trial context, these doctrines benefit more persons known to be guilty than they benefit persons known to be innocent. For conservatives, this is the end of the story.

This pattern of argument avoids the principle, admitted by most conservatives,⁷⁵ that an unjust conviction is far worse than an unjust acquittal. This principle is necessarily relative, because the only way to prevent all unjust convictions is to abandon enforcement of the criminal law. Blackstone put the acceptable ratio at ten false negatives to one false positive;⁷⁶ the ratio need not be precisely determined for the principle to have great force.

In part, the principle's force follows from utilitarian considerations. Unjust convictions impose a tremendous cost on the defendant, and a considerable cost on society. Moreover, utilitarian reasoning suggests a profound skepticism about the cost of acquitting the guilty. In the first place, scarcity of

74. For a discussion of the relationship between the fourth amendment and the protection of innocent people, see Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

75. See Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 461 (1989) ("Whether treated as a moral, constitutional, or popular sentiment inquiry, the greater injustice is almost universally seen in the conviction of the innocent.") (footnotes omitted). Nonetheless, "[s]ome dissenting voices have been raised." *Id.* at 461 n.22. In an early article, Professor Grano took an agnostic view of the preference for a high ratio of false acquittals to false convictions. See Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974). So far as I know, his is the only expressed reservation by a prominent conservative about the distinction between false positives and false negatives. See, e.g., *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stressing "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

76. 4 W. BLACKSTONE, COMMENTARIES *358.

prison resources means that individual acquittals do not affect the prison population.⁷⁷ Given that selective incapacitation remains problematic,⁷⁸ false acquittals may not cost anything in terms of unprevented crimes. Who can say that Willy Horton⁷⁹ committed graver outrages than would have been committed by the felon confined in the prison space his furlough made available? As for deterrence, how many street criminals count on being arrested, bound over, indicted, and then freed on a "technicality"? Invisible lost convictions do not affect general deterrence. Given that freeing the guilty for constitutional reasons has become virtually exotic,⁸⁰ the suggestion that crime will decrease if the Warren Court precedents are overruled is "inutterable nonsense."⁸¹

Even if substantially reducing the number of unjust acquittals, at the expense of a slight increase in the number of unjust convictions, would reduce the crime rate measurably,

77. Consider the results of the severe sentencing legislation adopted in Tennessee in 1979. The legislation identified a variety of Class X felonies. The law required that the court approve any plea bargaining down from a Class X charge, forbade probation, suspended sentences and bail pending appeal for those convicted of Class X crimes, and mandated that 40% of each Class X sentence's time be served before parole. 1979 Tenn. Pub. Acts ch. 318, codified at TENN. CODE ANN. § 39-1-701 to 39-1-704. Despite these apparent hammer blows at penological discretion, the average length of sentence for armed robbery in Tennessee *declined* under the law. See Thomas & Edelman, *An Evaluation of Conservative Crime Control Theology*, 63 NOTRE DAME L. REV. 123, 135-36 (1988). Perhaps the parole board, when forced to retain all Class X convicts for 40% of the nominal sentence's time, paroled convicts after the 40% period who otherwise would have served a higher percentage of the nominal sentence's time. This provision was repealed when Tennessee revamped its criminal law in 1989. 1989 Tenn. Pub. Acts ch. 591.

78. See, e.g., Cohen, *Selective Incapacitation: An Assessment*, 1984 U. ILL. L. REV. 253, 264-276 (discussing daunting empirical challenge of predicting individual criminal propensity). Cohen suggests an incapacitative strategy based on targeting the specific *crimes* of burglary and robbery rather than specific *criminals*. But, assuming *in arguendo* that such a strategy might succeed, the resource constraint means that not all guilty burglars and robbers can be committed for long sentences. If a guilty robber or burglar is acquitted, it means only that another guilty robber or burglar will occupy the prison space.

79. Furloughed murderer Horton raped a woman, thereby becoming grist for the 1988 presidential campaign. See *Dukakis Now Supports Ban on Furloughs for Murderers*, N.Y. Times, Mar. 24, 1988, § I, at 30, col. 6.

80. See *infra* note 149 (reviewing the empirical data on frequency of successful suppression motions).

81. An Attorney General, rather different from his counterparts of the eighties, offered this assessment of the claim that the Warren Court criminal procedure landmarks had contributed to the crime rate. See *Controlling Crime Through More Effective Law Enforcement, Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 226 (1967) (statement of Aaron Koota, quoting Nicholas deB. Katzenbach).

considerations of justice counsel against such a reduction. No doubt the aggregate amount of happiness matters, but the distribution of happiness matters too. We might not agree with Rawls and insist that every institution do no injury to the least well-off before we call it justified,⁸² but few would deny that individuals suffer a disproportionate share of the costs of crime control when convicted for offenses they did not commit.⁸³

If the connection between marginally increasing the risk of punishment run by the guilty and preventing future crimes were clearer than it is, or if a substantial number of crimes that might be prevented involved homicide or aggravated assault, perhaps the victims of undeterred offenses might have a stronger claim upon those whose guilt the evidence suggests but fails to prove. We should nonetheless abjure a casual attitude toward punishing the innocent as too dangerous a political principle to have at large. Consideration of the utility of practices and principles tends to merge with deontological thinking.⁸⁴ From either perspective, thoughtful people would

82. J. RAWLS, A THEORY OF JUSTICE § 87 (1971). Rawls criticizes classical utilitarianism for failing to "take seriously the distinction between persons." *Id.* at § 5, at 27. The utilitarian is indifferent toward the distribution of happiness, caring only for its aggregate quantity. Hence the utilitarian is willing to enact policies that confer great happiness on a few at the expense of a small cost to many, or that confer a small benefit to many but impose a ruinous cost on a few. One can agree with Rawls' objection to this form of utilitarianism, however, without fully subscribing to the rigid difference principle derived from it by Rawls.

83. Bishop Paley compared the unjustly executed to soldiers killed in battle for their country. See Sundby, *supra* note 75, at 461 n.22. A fair estimate of the nineteenth century can be derived from the knowledge that Holmes later compared the execution of the *guilty* to the death of soldiers fighting for their country. 1 HOLMES-LASKI LETTERS 806 (M. Howe ed. 1953) (Holmes to Laski, Dec. 17, 1925). Even in war, however, the object is to obtain victory with the fewest possible casualties.

84. Thus, R.M. Hare, the leading exponent of justifying categorical moral principles on utilitarian grounds, offers the security of the innocent against criminal penalties as an example of the kind of principle generated by his ethical system. See R. HARE, MORAL THINKING 162 (1981):

Prima facie moral principles are needed for the conduct of those who administer the law, and critical thinking has to select these principles Thus the grounds of selection will be utilitarian; but the principles selected may not themselves look utilitarian at all. They are likely to be, rather, of the sort dear to deontologists and intuitionists; they will insist on things like not punishing the innocent, not condemning people unheard, observing procedures in court which are calculated to elicit the truth from witnesses and cause the jury to attend to it, and so on. These prima facie principles of substantial, including procedural, justice in the administration of the law will be selected by critical thinking because their general acceptance is likely to further the interests of those affected, all in all, considered impartially, i.e. with formal justice. So,

prefer to inhabit a society with a strong commitment to preventing unjust punishment.⁸⁵ When conditions approach anarchy this preference might shift, as it did, for example, in Weimar Germany;⁸⁶ but such examples considered after a period no longer than a dozen years seem to confirm the preference for acquittal.

I think most conservatives would have little quarrel with these remarks. Conservatives, however, for the most part ascribe a substantially, if not wholly, retributive purpose to the substantive criminal law.⁸⁷ The retributive theory holds that whether good consequences follow punishment or not, society should punish criminals because criminals deserve punishment. This is a notion supported by subtle arguments and strong emotions, one I shall not challenge, or affirm, in this context. I know of no one who has written about punishment who equates the escape of deserved punishment with the infliction of undeserved punishment. Indeed it is said to be a strong consideration of retributive theory that, unlike its utilitarian alternative, it categorically forbids punishing the innocent.⁸⁸ The retributivist might modify this statement by insisting that retributivism categorically forbids only the

though the principles may accord with those defended by intuitionists, their justification is utilitarian.

85. Compare R. HARE, *supra* note 84, and H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22 (1968), with Rawls, *Two Concepts of Rules*, 1955 PHIL. REV. 1, 7-8, and C. FRIED, *supra* note 71.

86. Many causes contributed to the rise of Hitler, but flagrant political violence is often listed as one factor. See, e.g., R. HERZSTEIN, ADOLPH HITLER AND THE GERMAN TRAUMA 69 (1974) ("[By 1931, Center Party Chancellor Heinrich] Brüning . . . had to juggle forces such as unemployment, political chaos on the streets, the increasingly difficult, aged President von Hindenburg, a swing to the right by his own party, and a recalcitrant Reichstag."). Whatever its causes, the Reichstag fire was seen as a portent of Communist insurrection and enabled Hitler to obtain emergency powers from the Cabinet. See A. BRECHT, PRELUDE TO SILENCE 93 (1944); Mommsen, *The Reichstag Fire and its Political Consequences*, in REPUBLIC TO REICH 129, 129-30, 199-201 (H. Hulborn ed. 1972).

87. Whatever theory of punishment they may subscribe to during moments of detached reflection, conservative jurists seem to decide cases in accord with a retributive impulse. The best example is the practice of conservative justices in death penalty cases of describing the unsavory facts of each murder in some detail. See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2972-73 (1989) (Scalia, J., plurality opinion); *Godfrey v. Georgia*, 446 U.S. 420, 449 (1980) (White, J., dissenting). The intensity of the conservative hostility to *Mapp* and *Miranda* likewise can be explained only by retributivism, for on utilitarian grounds it is highly improbable that the exclusionary rules increase the crime rate.

88. See, e.g., P. BEAN, PUNISHMENT 29 (1981); McCloskey, *A Nonutilitarian Approach to Punishment*, in CONTEMPORARY UTILITARIANISM (M. Bayles ed. 1968).

deliberate punishment of innocent individuals,⁸⁹ but on an institutional level communities deliberately choose the risk of error they will run. The retributivist scarcely could defend a preponderance of the evidence standard of proof in criminal cases with the apology that no particular jury deliberately convicted the innocent. And the retributivist who commits herself to a double-effect approach to convicting the innocent on a statistical basis may not appeal logically to the rights of statistically potential crime victims as justification for increasing the acceptable ratio of false convictions to false acquittals.

So I conclude that, from a policy standpoint, the criminal justice system ought to value truth in an instrumental and qualified manner. Truth at trial is not valuable because knowledge is valuable. Indeed, conservatives are distressed precisely because some due process doctrines prevent the punishment of persons whose guilt is as certain after charges are dismissed as it was before. Rather, truth in adjudication is valuable because accurate factfinding enables punishment of the guilty and precludes punishment of the innocent. Because preventing unjust punishment is far more valuable than enabling just punishment, the object of criminal procedure should not be to minimize the total number of errors, but to minimize unjust acquittals subject to a very strong constraint that holds the number of unjust convictions to a practical minimum.

The words "conviction" and "acquittal" suggest the second conservative mistake in evaluating the truth-finding function. Conservatives speak of truth at trial as though truth mattered in no other context. This assumes that because the government hopes not to punish until after the trial, the government does not punish before the trial. The assumption is false, because many of the methods of criminal investigation are punitive in effect. Consider an arrest: the person in custody is as effectively imprisoned as he would be in a penitentiary, and frequently under circumstances even less congenial. Admittedly, any criminal justice system must tolerate the arrest of many persons whose guilt is less than certain, and a night's detention is not equivalent to a year's. The tolerable ratio of false positives to false negatives will decrease as the magnitude of innocent suffering declines. But the examples

89. See C. FRIED, *supra* note 71, at 126.

are not limited to search or arrest. Coercing confessions and effecting arrest by gunshot at least rival criminal conviction in the intensity of the suffering they inflict. Preventive detention can be conviction's functional equivalent.

So the conservative insistence on viewing the trial as a world unto itself is myopic. What happens at one person's trial can alter what happens to another person on the street or in the police station. The fate of the innocent often depends on what happens to the guilty. Criminal procedure that respects truth for its real value will have the object of convicting the guilty, so long as the innocent are not thereby punished either after a trial or without one. I turn now to consider whether the fourteenth amendment permits the federal courts to impose this kind of procedure on the states.

III. DUE PROCESS AND POLICE PRACTICES

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." ⁹⁰ No constitutional provision has acquired, or shed, as many meanings as the due process clause of the fourteenth amendment. In criminal cases due process came to mean "fundamental fairness," then "selective incorporation"—because so many Bill of Rights protections were essential to fundamental fairness. ⁹¹ Neither interpretation of the Due Process clause rests on secure doctrinal foundations. ⁹² Persuasive doctrinal considerations

90. U.S. CONST. amend. XIV.

91. See, e.g., Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982).

92. The total incorporation theory enjoys some support from the records of congressional deliberations over the proposed amendment. See CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866) (statement of Rep. Bingham); CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard). But total incorporation was not suggested during the campaign to ratify the amendment in the states. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949). In the seminal fourteenth amendment criminal procedure case, *Hurtado v. California*, 110 U.S. 516 (1884), eight of the Justices ruled that the fourteenth amendment did not require state grand jury presentment, a procedure required in federal prosecutions by the fifth amendment. The first Justice Harlan dissented, but did not mention the possibility of total incorporation. Nor did Hurtado's lawyer raise the claim in the brief for the plaintiff-in-error. Instead, both Hurtado and Harlan relied on Coke and Blackstone, both of whom had rendered Magna Charta's "per legem terrae" to include both the grand and petit jury procedures. *Id.* at 542-44 (Harlan, J., dissenting). Not until *Maxwell v. Dow*, 176 U.S. 581, 606-08 (1900) (Harlan, J., dissenting), is total incorporation put

might yet justify at least much of the incorporation legacy, although admittedly those who begin thinking about the issue in the terms of *Adamson v. California*⁹³—the 1947 decision that identified natural law and total incorporation as the *only* options for interpreting due process in criminal cases⁹⁴—may come to a contrary conclusion.

The language of the due process clause originates with Lord Coke, who used it as a translation of Magna Charta's chapter 39.⁹⁵ Chapter 39 states that no free man shall be punished by the King except after a "judgment of his peers and by the law of the land."⁹⁶ The Barons imposed the provision on King John in response to what they perceived as royal abuses. One of these abuses was John's practice of execution before judgment,⁹⁷ and not in any technical sense.⁹⁸ Another

forward in a Supreme Court opinion, in a claim advanced under the privileges-and-immunities clause rather than the due process clause. If the original understanding had encompassed total incorporation, four decades of legal malpractice by defense lawyers around the country are the only possible explanation for the record.

Some modern defenders of total incorporation have sought to ground the theory in antebellum, antislavery Republican ideology. See M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); cf. Commager, *Historical Background of the Fourteenth Amendment*, in *THE FOURTEENTH AMENDMENT* 14 (B. Schwartz ed. 1970). This approach reads the amendment at an extraordinarily high level of generality, only a little more definite than imputing to the framers the purpose of fostering a good society. Moreover, this interpretation seems to neglect that the Republicans who defended the proposed amendment balanced their claims for the need to nationalize civil liberties with equally prominent and frequent assertions that the amendment did not conflict with the legitimate principles of federalism. See E. FONER, *RECONSTRUCTION* 258-59 (1988); W. NELSON, *THE FOURTEENTH AMENDMENT* 3-12, 110-47 (1988). Even if one is willing to read the amendment as a coded message enacting all aspects of Republican ideology, total incorporation does not comport with the weight of the evidence.

But if at least some historical support exists for total incorporation, there seems to be none for selective incorporation as a doctrine apart from generalized notions of substantive due process. And, as a matter of substantive due process, the criminal procedures required by the Bill of Rights, *qua* procedures as opposed to the freedom from arbitrary restraint that they protect, would be very hard to describe as indispensable to ordered liberty. See Henkin, "*Selective Incorporation*" in *the Fourteenth Amendment*, 73 *YALE L.J.* 74, 87-88 (1963).

93. 332 U.S. 46 (1947).

94. *Id.* at 49-54.

95. See A. HOWARD, *THE ROAD FROM RUNNYMEDE* 298-315 (1968); H. TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN CONSTITUTION* 236-37 (1911); Kurland, *Magna Carta and Constitutionalism in the United States: "The Noble Lie,"* in S. THORNE, W. DUNHAM, P. KURLAND & I. JENNINGS, *THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* 48, 62 (1965).

96. The translation is taken from R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 123 (1957). The "and" is not wholly uncontroversial. See R. MCKECHNIE, *MAGNA CARTA* 379-80 (2d ed. 1914).

97. See R. MOTT, *DUE PROCESS OF LAW* 33 (1926); R. MCKECHNIE, *supra* note 96,

abuse was the supplanting of customary feudal law with royal law.⁹⁹ Thus, even seven centuries ago, notions of due process had both procedural and substantive components.¹⁰⁰

These two components became profoundly confused with the

at 376-82.

98. R. MCKECHNIE, *supra* note 96, wrote that chapter 39's "object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jeddard justice,'" dropping the following footnote:

The same grim tradition applied to Lidford as to Jedburgh:

"I oft have heard of Lydford law,
How in the morn they hang and draw,
And sit in judgment after."

Id. at 376 & n.4 (citation omitted).

99. See 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW 172-73* (2d ed. 1899). It may be easier to see the connection between substance and procedure in the circumstances of 1215 than in our own. If the King's will is the supreme law, a judgment of peers would have provided scant protection to the Barons. Thus it seems probable that the judgment of peers was to be rendered according to a law holding priority over the King's will. See G. ADAMS, *THE ORIGIN OF THE ENGLISH CONSTITUTION 167-76* (2d ed. 1920).

100. G. ADAMS, *supra* note 99, at 242-44, offers an illuminating passage, unbiased by thoughts of school desegregation, abortion, or *Miranda*:

If the interpretation [here defended] as on the whole the more probable is accepted, viz., that what the barons had in mind in this clause was not chiefly the form of trial, but was the general body of the law and the rights which it secured them, then the provision is to be regarded as reactionary in only a slight degree. It uses words which can be later interpreted as securing a *judicium parium* to the baronial class, but this particular point was not in mind in 1215; what was then demanded was a trial according to law and securing to them their legal rights. Taken in this sense clause 39 of Magna Carta would correspond somewhat closely to the general prohibition included in Amendment XIV to the Constitution of the United States: "nor shall any State deprive any person of life, liberty, or property without due process of law." The clause is, I think we must say, strictly feudal in character; the barons had in mind almost certainly no one but their own order, and the court which they demanded was the king's feudal court. From such a narrowly feudal point of view, ignoring the king's new prerogative courts, they were entirely right in the demand they made. Under the feudal law, alone considered, there was no way by which the king could rightfully deprive them of their property, or personal liberty, or life, without a *judicium parium*. The rather vague and general terms in which they stated their demand, while they give us labour in interpretation, proved historically fortunate, because, as men's legal ideas changed and feudalism disappeared, they could be adapted to new conceptions of civil rights and seemed in the end to embody a universal principle of political liberty. There is a sense in which it is not wrong to say that this broader protection was secured to us by Magna Carta, and also to say the same of the other rights once erroneously supposed to be directly intended by the Charter, like the jury trial, Habeas Corpus, and consent to taxation. What did secure them to us was in truth the steady development of the limited monarchy and constitutional government which dates from Magna Carta and without it could hardly have been. In this sense it would not be incorrect to say that the sentence quoted above from the Constitution of the United States is a modern formulation of clause 39.

Id. (footnotes omitted).

adoption of due process as a constitutional constraint on American republican governments. The Barons naturally did not fear the abuse of Parliament, which they dominated. It made sense for them to force the King to promise to injure no free man without obtaining, through fair procedures, a judgment that customary substantive law authorized the injury.¹⁰¹ But what did the “law of the land” mean in a representative democracy? If legislation constituted the law of the land, the legislature could not violate the limitation.¹⁰² Similarly, the procedural component is murky. Suppose a facially fair procedure returns an adverse decision in the absence of any evidence to support it? What protection is fair procedure, if the substantive law authorizes arbitrary punishment? What does a fair procedure mean, anyway?

In its only full-fledged due process case before the Civil War, the Supreme Court adopted a historical test and held that due process meant any legal process that was approved by the common law of England in 1789.¹⁰³ The adoption of the fourteenth amendment made this formulation unworkable, assuming it was workable otherwise. When the State of California adopted the prosecutorial information as a promising reform over the grand jury indictment process, the Supreme Court encountered no difficulty in holding the new procedure, anathema to the common law, consistent with the Constitution.¹⁰⁴ Due process meant either a procedure known at common law, *or* a procedure approved by the legislature within certain limits.¹⁰⁵ Thus substance and procedure entwined like the serpents of a caduceus; the substantive requirement that punishment comport with “the law of the land” limited the procedures that could be adopted by the states.

The law of the land:

refers to that law of the land in each State, which derives

101. See *Hurtado v. California*, 110 U.S. 516, 531 (1884).

102. See *id.* at 535-36.

103. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

104. *Hurtado*, 110 U.S. at 529 (“[To hold that common-law pedigree] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.”).

105. *Id.* at 528-29.

its authority from the inherent and reserved powers of the State, *exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions*, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.¹⁰⁶

This was not written by Justice Brennan; rather it was written by Justice Mathews for an all-but-unanimous Court sixteen years after the ratification of the fourteenth amendment. The *Hurtado* opinion forthrightly invokes a law higher than the legislation of any state, a law thought to be accessible to, and enforceable by, the federal courts, although respect for democracy counseled great deference to legislative choices.

Selective incorporation is a substantive due process doctrine. Freedom of speech and worship, jury trial, security from arbitrary search and seizure, the privilege against self-incrimination, and so on, all eventually found their way into the Supreme Court's conception of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."¹⁰⁷ Parallel arguments constitutionalized, for a time, the liberty of contract.¹⁰⁸

106. *Id.* at 535 (emphasis added).

107. *Id.*

108. The case initiating federal constitutional scrutiny of state interference with free expression, *Gitlow v. New York*, 268 U.S. 652 (1925), offers a good illustration of the identity of doctrine underlying selective incorporation and substantive due process. The Court assumed that freedom of speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666. The Court expressly rejected dictum to the contrary contained in *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 543 (1922). The *Gitlow* opinion supports the repudiation of the *Cheek* dictum with footnote nine, which cites *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) ("But even if we were to assume that freedom of speech and of the press were protected from abridgment on the part not only of the United States but also of the states . . ."); *Twining v. New Jersey*, 211 U.S. 78 (1908) (a criminal procedure case applying the "fundamental" liberty test to deny that due process prohibits comment on invocation of the privilege against self-incrimination); *Coppage v. Kansas*, 236 U.S. 1 (1915) (a notorious substantive due process case invalidating a state law prohibiting "yellow dog" contracts); *Fox v. Washington*, 236 U.S. 273 (1915) (holding that a colorable constitutional question was raised by a state court decision, the opinion in which declared that the federal constitution protects the freedom of speech); *Schaefer v. United States*, 251 U.S. 466 (1920) (a federal prosecution of the publishers of a German language newspaper for interfering with the war effort during World War I); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (Court assumed without deciding that the Constitution protects freedom of expression); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (a substantive due process decision striking down a state law that forbade the teaching of foreign languages). The specific page references in *Gitlow's* footnote

Yet the *Hurtado* opinion may not fairly be charged with disregarding the constitutional text, legal history, or the intentions of the framers. If the law of the land is legislation, if fair procedure is what the legislature provides, then there is no point to denying the states the right to punish without due process.¹⁰⁹ The problem, recognized by the *Hurtado* Court, is how to keep the due process clause from meaning anything without reducing it to meaning nothing.

Critics argue that experience with substantive due process has suggested that this cannot be done.¹¹⁰ Regardless of whether substantive due process should live or die, however, there is no separating *Lochner v. New York*¹¹¹ from *Gitlow v. New York*,¹¹² *Roe v. Wade*,¹¹³ and *Mapp* or *Miranda* on grounds of legitimacy. All are substantive due process cases, and while some may be wiser than others, none can be less or more legitimate.

I shall argue, however, that the Warren Court criminal procedure landmarks can be recharacterized as procedural due process cases. The only substantive entitlement required for rehabilitating them in this way is a constitutional right against punishment except for conduct that violates a contemporaneous provision of positive law. In the absence of such a substantive constitutional entitlement there is no point to any procedural safeguard, however rudimentary; if the government has the constitutional authority to punish people who are innocent, acquittal at a trial of any description would not bar the defendant's punishment.

nine are confusing, bordering on random; but there can be no doubt that to the *Gitlow* Court freedom of speech and press was nothing but another species of the "liberty" protected by substantive due process. This same "liberty" included the right to freedom of contract, the constitutional value animating *Coppage* and *Lochner v. New York*, 198 U.S. 45 (1905).

109. See *Hurtado*, 110 U.S. at 531:

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land . . .

110. See, e.g., J. ELY, *supra* note 58, at 43-72.

111. 198 U.S. 45 (1905).

112. 268 U.S. 652 (1925).

113. 410 U.S. 113 (1973).

I think it fair to impute this substantive entitlement to the due process clause,¹¹⁴ although it also could be grounded on the equal protection or privileges and immunities clause. The central violation of due process is punishment without trial, the abuse attributed to King John and proscribed by Magna Charta. But this conclusion presupposes that punishment can be imposed only according to the law, for otherwise there would no issue to be tried. Thus, a constitutional guarantee of fair procedure logically entails some substantive constitutional entitlement as well. The connection between substance and procedure is therefore not as artificial as sometimes supposed.

Because no one asserts that states retain constitutional power to punish either status¹¹⁵ or conduct that has not been outlawed,¹¹⁶ the precise scope of the substantive limit on the causes for punishing individuals does not matter. For the purposes of criminal procedure I am willing to assume that the *only* substantive limitations on state power to punish are an equal protection requirement that conduct rather than mere status be the cause of punishment, and a due process requirement that this conduct be prohibited prospectively by positive law. Given these two limits, constitutionally required procedural safeguards in criminal cases are not themselves among the fundamental principles at the foundations of our political institutions. Rather, the due process clause requires these procedures because without them unauthorized punishment, forbidden by the fourteenth amendment, would be visited on individuals. If this is so, the Warren Court criminal procedure

114. This would follow from the origins of the idea of due process in Magna Charta's chapter 39, as well as comport with the understanding of the current Supreme Court. In *United States v. Salerno*, 481 U.S. 739 (1987), the Court, per Chief Justice Rehnquist, upheld the constitutionality of preventive pretrial detention, but freely conceded "the 'general rule' of substantive due process that the government may not detain a person prior to a judgment of guilt in a criminal trial." *Id.* at 749. See also *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) (Posner, J.) ("To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law . . .").

115. See *Robinson v. California*, 370 U.S. 660 (1962) (holding that the eighth amendment, incorporated by the fourteenth amendment, forbids punishment for the crime of *being* addicted to narcotics).

116. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (striking down a vagrancy ordinance for failing to identify what is criminal with reasonable clarity).

cases rest on more than the fragile and disreputable predicate of substantive due process. For examples, consider the tallest lightning rods on the Warren Court edifice, *Mapp* and *Miranda*.

A. *The Case of the Exclusionary Rule*

Conservatives criticize the fourth amendment exclusionary rule because, without any legitimate constitutional basis, it frustrates the search for truth at trial.¹¹⁷ This critique is mistaken, because legitimate sources of constitutional law require some protection for innocent victims of official detention and home invasion. If the fourth amendment had never been written, the fourteenth amendment due process clause would justify something very similar to the Warren Court restrictions on searches and seizures.

Arrest or home invasion without cause violates the same principle that is violated by punishment without trial. The innocent will suffer needlessly. Arbitrary home invasion unambiguously advances the cause of truth; afterward we *know* the target was innocent. But the intrusion is irreversible.

Arrest and search differ obviously from punishment without trial, because arrest and search involve a lesser intrusion, and justifications for arrest and search are easier to prove. These differences are of degree, however, not of kind. The close relation between the conditions of probation and parole, which only a conviction can support, and arbitrary detention and home invasion by the police, suggests as much.¹¹⁸ The search or seizure of persons who have not engaged in illegal conduct offends the core principle of due process, that illegal conduct must be proved before inflicting punishment.

The principle, however, bends to necessity. The system must impose burdens on people in the course of investigation long before anything like certainty of guilt can be shown. Sometimes the burden falls on persons who have committed no crime but for whatever reason possess evidence regarding one.

117. See, e.g., REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 575.

118. See, e.g., N. COHEN & J. GOBERT, THE LAW OF PROBATION AND PAROLE § 6.02 (1983) (noting that consent to search is a common condition of probation).

But if the principle bends, it does not break; subjecting individuals to government intrusions and restraints on mere suspicion is unnecessary.

Public need, not official motive, has guided Supreme Court decisions defining when government may restrain individual liberty without legislative authorization or formal hearing. War¹¹⁹ and insurrection¹²⁰ permit massive restrictions on personal liberty. Manifest danger to self or others may justify civil commitment.¹²¹ Clear and convincing evidence of criminal propensity may justify preventive detention.¹²² Yet in each instance, due process permits the intrusion only to the extent of public necessity and, wherever possible, imposes formal procedure to enforce the limit.

If detention and home invasion *without cause* amount to punishment without trial, as I think they do, at the same time that public necessity demands some scope for investigation, then due process forbids detention and home invasion without cause but permits them with cause. What remains to be defined is cause. Would not that definition, as a due process matter, be supplied by reference to flexible standards of reasonableness? And if that is so, it would be fair to describe the result as the incorporation of the fourth amendment by the fourteenth—although there is no logical necessity to do so.¹²³

If detention and home invasion without cause violate the Constitution by needlessly punishing the innocent, then due process further requires a rational procedure for testing the existence of cause. Here, then, is the procedural due process aspect of search and seizure law. Whenever the government implicates “life, liberty, or property,” due process ordinarily requires a preliminary hearing.¹²⁴ Traditionally, only the

119. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944).

120. See, e.g., *Moyer v. Peabody*, 212 U.S. 78 (1909).

121. See, e.g., *Addington v. Texas*, 441 U.S. 418 (1979); *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

122. See, e.g., *United States v. Salerno*, 481 U.S. 739 (1987).

123. Thus, claims under 42 U.S.C. § 1983 for injuries inflicted by police use of excessive force are grounded alternately on the fourth amendment as incorporated by the fourteenth, or on fourteenth amendment due process *simpliciter*. See Comment, *Excessive Force Claims: Removing the Double Standard*, 53 U. CHI. L. REV. 1369 (1986) (authored by Bradley M. Campbell). The author notes, at 1390-91, that “[t]he underlying concern when police use excessive force is precisely that the police have been able to ‘skip the trial’ and proceed directly to punishing the detainee.”

124. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884).

risk of nonappearance justified pretrial detention; staying detention until after the trial would frustrate the hearing process itself.¹²⁵ But exigency only defers the hearing, it does not abolish it. The police may arrest without warrant when they see the crime, but a hearing then must be held on the issue of probable cause.¹²⁶ Health inspectors may destroy infected food, but a hearing then must take place on the propriety of their action, with the government liable for compensation if the inspectors lacked sufficient cause.¹²⁷

The warrant procedure fits this mold perfectly; the search target may not be searched without cause, and, where possible, cause must be established through a neutral if *ex parte* procedure.¹²⁸ I have elsewhere argued that much can be said for viewing the procedure as conclusive absent plain error or procedural defect.¹²⁹ But what of the warrantless search? Indeed, what of *any* search conducted without cause that does not by some coincidence produce evidence?

Absent the exclusionary rule, the victim of such a search has no remedy. In theory there are damages and administrative discipline and, perhaps, a heaven for the faithful. If these remedies worked, the exclusionary rule would not anger anyone, because courts would not need to apply it. By the same token, even if discipline or damages did prevent unreasonable searches, these remedies would still permit the escape of the guilty as much as the exclusionary rule does. In fact, the exclusionary rule is among the causes of damage actions and internal discipline. Indeed, administrative discipline provides the essential mechanism for the exclusionary rule's deterrent effect.¹³⁰

I concede that if the exclusionary rule did not deter—indeed even if it did not *uniquely* deter—the conservatives would have a case for its abolition. An exclusionary rule that does not deter defeats the search for truth at trial without furthering the pursuit of truth on the street. But if the rule does uniquely deter, then its enforcement provides the only

125. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). Professor Alschuler has questioned this reading of history. See Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 548 (1986).

126. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103 (1975).

127. See *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 320 (1908).

128. See *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

129. See Dripps, *Living With Leon*, 95 YALE L.J. 906, 941-44 (1986).

130. But see generally REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9.

practical protection for the innocent who would otherwise suffer detention and home intrusion outside the courtroom.

Thus my case for the exclusionary rule depends on the connection between benefitting a criminal by suppressing evidence and protecting others from arbitrary restraints on their liberty. This connection has two components, one legal and one empirical. On the legal level, the issue is the legitimacy of permitting one party to enforce the legal rights of another. Professor Grano has raised article III's case-or-controversy requirement as a bar to permitting third parties to enforce constitutional rights, but his argument is unconvincing.¹³¹ For article III purposes, the Supreme Court consistently has required no more than injury-in-fact.¹³² Congress can create private attorneys general so long as that injury exists.¹³³ If enforcing the Constitution depends on a private attorney general, there is no constitutional barrier to the Court appointing guilty criminals to that office, for criminal conviction is injury-in-fact.¹³⁴

To describe the defendant's suppression motion as a procedural safeguard for the security of unknown persons contradicts the precept that "Fourth Amendment rights are personal

131. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985).

132. *Cf. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (describing the rejection of the vicarious assertion of rights as prudential, rather than constitutionally required); *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975) (same).

133. *See, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77 (1940).

134. The Supreme Court has permitted injured persons to assert the constitutional rights of others when success would avert the threatened injury in several contexts characterized by the practical inability of the right-holders to raise their own claims. Because the justification for rejecting vicarious claims depends on the preference for avoiding unnecessary adjudication and for adjudicating only with the assistance of vigorous advocacy, when the third party has a strong incentive to litigate and the right-holder has none, the usual rule is set aside. *See Craig v. Boren*, 429 U.S. 190, 195-97 (1976) (allowing beer sellers to attack a limitation on the right of young males to buy beer on the ground that the limitation violates equal protection rights of these potential buyers); *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972) (holding that supplier of contraceptives may rely on consumers' right to privacy to attack law forbidding distribution of contraceptives); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953) (allowing White real estate seller to defend an action for breach of restrictive covenant by invoking rights of potential Black purchasers). The *Barrows* opinion states that

[u]nder the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

Id.; *see also Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976) (plurality opinion).

rights that may not be asserted vicariously."¹³⁵ I cannot think of a stronger argument on behalf of this approach. The refusal to extend standing to suppress at least to the target of the investigation grossly disserves the deterrent purposes of the rule, and this disservice falls disproportionately on innocent persons.¹³⁶ Doubters are referred to *United States v. Payner*,¹³⁷ a vulgar wink at lawless government that should be required reading for every admirer of former Justice Lewis Powell. Those undisturbed by *Payner* should peruse *Bradford v. Johnson*,¹³⁸ a case in which a statement obtained by pressure on the testicles of A was offered in evidence against B.¹³⁹

Precedent scarcely stands in the way of reform; the standing cases provide the *only* setting where the Supreme Court treats the exclusionary rule as a personal remedy rather than a systemic deterrent.¹⁴⁰ So long as the Court subscribes to the proposition that "the ruptured privacy of the victims' homes and effects cannot be restored,"¹⁴¹ every application of the exclusionary rule involves the vicarious assertion of fourth amendment rights.¹⁴² The same is true of certain civil remedies. In *Tennessee v. Garner*,¹⁴³ for example, the Court upheld a damages action brought by the father of the victim of a fatal police shooting. Even though Garner's father was nowhere near the scene of the killing, and therefore had no personal fourth amendment interest at stake, the Court held

135. *Rakas v. Illinois*, 439 U.S. 128, 133 (1978).

136. See W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 11.32 (2d ed. 1987); Doernberg, "The Right of the People": Reconciling Collective and Individual Interests under the Fourth Amendment, 58 N.Y.U. L. REV. 259 (1983); Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493 (1980). The most attractive alternative is the target standing theory adopted by Justice Traynor. See *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).

137. 447 U.S. 727 (1980) (holding that record obtained by burglarizing the hotel room of his accountant was admissible against the client).

138. 354 F. Supp. 1331 (E.D. Mich. 1972), *aff'd*, 476 F.2d 66 (6th Cir. 1973).

139. *Id.* at 1332-33.

140. On systemic or systematic deterrence, as opposed to special and general deterrence in the context of the exclusionary rule, see REPORT NO. 2, *SEARCH AND SEIZURE*, *supra* note 9, at 608.

141. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

142. See Dripps, *supra* note 129, at 920-22; Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 275-77 (1988).

143. 471 U.S. 1 (1985).

that he had standing to sue,¹⁴⁴ implicitly approving vicarious enforcement of fourth amendment rights. So, even if the standing requirement itself is retained for reasons of *stare decisis*, the standing cases provide only isolated authority for rejecting the protection of constitutional rights by private attorneys general.

On the empirical level, the exclusionary rule protects the innocent only if it does in fact deter. The conservative perspective ignores this relation between deterrence and innocence. For example, the Justice Department's Report on the issue argues that "[p]eople whose rights of privacy are violated, but who are not prosecuted, are afforded no remedy by the exclusionary rule."¹⁴⁵ This is true but it misses the point. Although the exclusionary rule may not provide a direct remedy to unprosecuted victims, it does provide a broader even if indirect remedy by preventing harm. If the exclusionary rule actually deters the government, the right to privacy of many potential victims will be safeguarded and a direct remedy will never need to be sought. The Report proceeds to admit that deterrence is "[a]t the heart of the current debate over the exclusionary rule,"¹⁴⁶ but I suspect that authors who really believe this concession would have made a stronger showing on deterrence than does the Report.

On the issue that lies "[a]t the heart of the current debate," the Report disregards not only new evidence on deterrence, but almost all of the old evidence as well. The Report relies almost exclusively on the early research of Dallin Oaks.¹⁴⁷ The Report faithfully restates why Oaks thought the exclusionary rule might have little deterrent effect, but incredibly ignores the *evidence* that Oaks thought confirmed his speculations: the continued high rate of successful suppression motions in three cities following adoption of the rule.¹⁴⁸ If a high success rate for suppression motions provided the best evidence of nondeterrence in 1970, what do conservatives make of the subsequent consistent, indeed unanimous, empirical finding, based on national samples of contemporary data, that successful suppression motions have

144. *Id.* at 5.

145. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 611.

146. *Id.*

147. *See id.* at 612-13.

148. Oaks, *supra* note 20, at 681-89.

become quite rare, indeed exotic?¹⁴⁹

As for the reasoning cited in the Report, that the rule can have no direct impact on individual officers who violate constitutional rights in particular cases, the rule was never thought to operate solely through specific deterrence. The Report notes only that Oaks did not address the possibility of systemic deterrence,¹⁵⁰ but, again according to his formulation of the question and the data, the rule must deter somehow because of the low rate of successful motions to suppress. The Report concedes that *Mapp* did indeed induce major reforms within police departments, then adds lamely that "it is less clear" *how great* the deterrent effect on individual officers may be as a result.¹⁵¹

Just how great the rule's deterrent effect can be is documented in a recent study by Myron W. Orfield, Jr.¹⁵² Orfield interviewed twenty-six police officers in the narcotics divisions of the Chicago Police Department. Orfield summarizes the results as follows:

This study—based on extensive, structured interviews with Chicago narcotics officers—documents the exclusionary rule's significant deterrent effects. On an institutional level, the rule has changed police, prosecutorial, and judicial procedures; on an individual level, it has educated police officers in the requirements of the fourth

149. See Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 617-22 (National Institute of Justice study indicates that California prosecutors decline fewer than 1% of felony arrests because of search and seizure problems; other studies indicate that the exclusionary rule's effect on all stages of arrest processing "results in the nonprosecution and/or nonconviction of in the range of 0.6% to 2.35% of felony arrests in the jurisdictions studied"); Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 598 (Table 8) (successful motions to suppress physical evidence occurred in 0.69% of 7,484 criminal cases sampled); REPORT OF THE COMPTROLLER GENERAL, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS (Rep. No. CDG-79-45) (suppression motions based on fourth amendment granted in 1.3% of 2,804 federal cases; convictions were obtained in half of the cases in which motions were granted). Perhaps defense attorneys neglect to file motions in many meritorious cases, but Nardulli's data do not indicate that the rate of granted motions varies significantly with the percentage of cases in which motions are filed. See Nardulli, *supra*, at 596, 598 (Table 9).

150. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 612.

151. *Id.* at 612-13.

152. Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (authored by Myron W. Orfield, Jr.).

amendment and has punished them when they have violated those requirements.

. . . .

In summary, Chicago's narcotics officers are virtually always in court when evidence is suppressed in their cases; they always eventually understand why the evidence was suppressed; and this experience has caused them to use warrants more often and to exercise more care when conducting warrantless searches. The study also demonstrates that judicial suppression, and the actions that police officials take in response to suppression, "punish" officers for conducting illegal searches. And although in-court police perjury clearly exists in Chicago and impedes the deterrent effect of the exclusionary rule, strong institutional responses to perjury by the courts and the police department have significantly reduced the impact of perjury on the practical operation of the rule. Finally, all of the officers concluded that the exclusionary rule should be retained, albeit with a good faith exception; they generally saw the rule as a positive development and believed an alternative tort remedy would "overdeter" the police in their search and seizure activities.¹⁵³

It seems that Oaks' study not only fails to describe contemporary suppression motion success; his nonquantitative speculations about the operation of the rule likewise fail to describe contemporary reality.

Granted, the Orfield findings are based on interview data obtained from officers involved in narcotics work in a single city. The utility of exclusionary rule research, however, does not depend on unachievable perfection. The Orfield survey simply adds to the long list of items supporting the deterrent effect of the exclusionary rule.¹⁵⁴ Against the totality of the

153. *Id.* at 1017-18.

154. Item: successful suppression motions have become rare, and their infrequency cannot be explained by systemic neglect. *See supra* note 149. Item: warrant use skyrocketed after *Mapp*, an increase so spectacular that other factors cannot possibly explain it. *See Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 708-11 (1974); Murphy, *Judicial Review of Police Methods in Law Enforcement*, 44 TEX. L. REV. 939, 941-42 (1966) (prior to *Mapp*, search warrants "had been rarely used," but 17,889 had been obtained as of December 1965). Item: specific changes in fourth amendment law have caused documented corresponding changes in police policy. *See Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the*

contemporary evidence, the Report relies on a twenty-year-old, three-city survey, conducted by an arch-conservative, for the limited claim that deterrence is unproven. That high-powered Justice Department lawyers could do no better itself provides weighty evidence that the rule in fact deters.

Conservatives, moreover, stand in a peculiar position for skeptics of deterrence. On the one hand, conservatives believe that a marginal change in the probability or severity of punishment can deter the youthful and impulsive members of the underclass who would otherwise engage in predatory crime. On the other, conservatives describe the "costs" of the exclusionary rule as obvious and substantial.¹⁵⁵ One would suppose these premises would predict the exclusionary rule's deterrent effect on a rational police bureaucracy with such confidence that overwhelming empirical evidence would be required *to refute* the deterrence hypothesis. Indeed, what would it say about our police departments if the rule did not discourage police practices that result in suppression of evidence? Only if police departments are indifferent to truth and justice, or wholly without control over individual officers, could the rule fail to deter.

The provision of civil actions with substantial minimum damages might achieve the same effect.¹⁵⁶ For precisely that reason, no one wants them. Indeed, when the police incur liability under 42 U.S.C. § 1983 for those few unconstitutional acts that might result in substantial damages, the prosecution is frequently willing to deal away the criminal charge to

Police and Derailing the Law, 70 GEO. L.J. 365, 400-01 & nn.174-75 (1981). Item: experienced law enforcement officials confirm its deterrent effect. See *The Exclusionary Rule Bills: Hearings on S. 101, S. 755 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 335-36 (statement of G. Robert Blakey) ("To the degree that I have been involved in [criminal justice] for 20 years, I will tell you unequivocally that the suppression rule, in fact, deters. . . . Anyone who suggests to you the contrary, in my judgment, does not know what he is talking about."); Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, 28, 30 (Summer/Fall 1982); Stern, Letter from Judge Herbert Stern to Senator Charles McC. Mathias (May 12, 1982) ("I have spent my entire career working within the criminal justice system It is, I think, a slander to suggest that our law enforcement authorities are either so stupid or uncaring that they are . . . undeterred by what the courts say they must do") (quoted in Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 599 n.211 (1983)).

155. See, e.g., REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 693.

156. See, e.g., *id.* at 625-31.

escape the prospect of liability.¹⁵⁷ Whether achieved by civil action or by suppression motion, effective deterrence of fourth amendment violations would reduce the amount of crime discovered and punished. The exclusionary rule makes the cost obvious. But the plea bargain/release agreement illustrates that effective civil actions would likewise "rub our noses"¹⁵⁸ in the release of the guilty. Damage actions that deter would have the same advantages and disadvantages as the exclusionary rule.

So one is left with the uncomfortable belief that conservatives favor alternatives to the exclusionary rule because they do not deter. The Justice Department Report makes the following observations. Since 1971, plaintiffs have filed an estimated 12,000 *Bivens*¹⁵⁹ actions. In only five cases have the defendants actually paid damages, and it is not known whether any of these involved illegal search and seizure.¹⁶⁰ With respect to suits under 42 U.S.C. § 1983, the Department's research discovered "fewer than three dozen reported fourth amendment cases over the past 20 years."¹⁶¹ The Report identifies two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates.¹⁶²

With respect to internal discipline, the Justice Department documents only seven investigations into fourth amendment violations by its agents since 1981; none resulted in the imposition of sanctions.¹⁶³ The Department did obtain two criminal convictions for violation of fourth amendment rights, but the defendants were subsequently pardoned by the President.¹⁶⁴ After this review of the alternatives, the Report concludes that "although both could be improved, the necessary disciplinary provisions already exist in the federal

157. *E.g.*, *Town of Newton v. Rumery*, 480 U.S. 386 (1987); see Note, *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 310, 311 n.7 (1987).

158. Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

159. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that direct action under fourth amendment is available).

160. REPORT NO. 2, SEARCH AND SEIZURE, *supra* note 9, at 626-27.

161. *Id.* at 630.

162. *Id.* at 627.

163. *Id.* at 623.

164. *Id.* at 621 n.128.

system and federal civil remedies provide adequate redress and deterrence in their present form.”¹⁶⁵

I believe, at least at the federal level, that serious search and seizure violations are quite rare. But if the exclusionary rule deters, this is only to be expected. Take away the suppression remedy and show an ambitious officer the figures in the Justice Department’s report, and the situation is likely to change. To abolish the exclusionary rule, leaving the rights of the innocent to depend solely on civil actions and internal discipline, would be to leave security against arbitrary detention and home invasion in the same condition as the victim of an Aztec sacrifice: bound to the altar and armed with a sword of feathers.

The conservative hostility to the exclusionary rule thus provides an excellent example of the myopic premises that alone can support that hostility. Policy considerations support the exclusionary rule because it uniquely deters arbitrary invasions and restrictions of individual liberty. Those who lift the conservative blinders and look beyond the trial will classify this result as an unequivocal advance for criminal procedure’s appropriate concern with separating the innocent from the guilty.¹⁶⁶ The most ancient sources of due process confirm the legitimacy of reading the fourteenth amendment as imposing this judgment on the states. Nearly three decades of Supreme Court precedent have followed this reading, and more than a century’s worth has applied this approach against the excesses of federal agents.¹⁶⁷ Only dogmatic acceptance of the conservative premises could justify casting aside this precedent for the sake of legitimacy and truth. But given dogmatic belief in those premises, thoughtful people might well accept casting aside this precedent, even after so shallow a review of the law and the empirical evidence as is mustered in the Report.

B. The Case of Confessions

The conservative critique of *Miranda*, *Escobedo* and *Massiah* makes good sense from the vantage point of conservative

165. *Id.* at 639.

166. *See supra* notes 67-83 and accompanying text.

167. The case law begins with *Boyd v. United States*, 116 U.S. 616 (1886).

assumptions. Because constitutional limits on the power of police to obtain admissible confessions diminish the truth-finding capabilities of the trial, the courts should not impose such limits unless clearly commanded to do so by the Constitution as originally understood.¹⁶⁸ Again the conservative approach condemns the Warren Court precedents as deviations from legitimate constitutional authority at the expense of truth finding, which conservatives see as the primary policy goal served by the criminal justice system.¹⁶⁹

But those who modify the conservative premises as I have suggested probably will find nothing illegitimate or unwise about the Warren Court confessions cases. Of course, excluding a confession always damages the search for truth at trial, but if truth at trial were our primary goal we would not hesitate to coerce confessions without limit. Conservatives staunchly defend the old due process voluntariness test,¹⁷⁰ but it is hard to see why. There is no suggestion that the ratifiers of the fourteenth amendment intended specifically to prevent the states from coercing confessions. Coercion advances substantially the search for truth at trial. So although the conservative premises yield a critique of *Miranda*, they also yield an equivalent critique of *Brown v. Mississippi*.¹⁷¹

But if coercion can be punitive in effect, then what happens in the station house can punish the innocent just as can what happens at trial. I have no moral objection to formal compulsion of incriminating answers through the same set of sanctions employed in civil cases.¹⁷² In contrast, the courts must reject evidence obtained through the abuse of one suspect if other suspects are not to be subjected to similar treatment.

168. The Justice Department's Report on *Miranda* has evoked extensive debate. See Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938 (1987); Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987); Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988).

169. See REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 41, at 439.

170. See Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

171. 297 U.S. 278 (1936). The deputy in charge of interrogating Brown testified in court that Brown confessed to murder only after being whipped, but that the whipping was " '[n]ot too much for a negro; not as much as I would have done if it were left to me.' " *Id.* at 284. The Supreme Court held the confession involuntary and therefore a violation of due process. *Id.* at 287.

172. See Dripps, *supra* note 67.

That due process bars coercive methods of interrogation, quite apart from any incorporation of the fifth amendment privilege, seems undeniable once one considers the case of the tortured suspect who does not break. There is no incrimination, but the suspect nonetheless suffers official violence without the authorization of a criminal conviction.

From this perspective, what commends *Miranda* is not the protection of the suspect's autonomous choice. The warnings pretty clearly have not impeded law enforcement because they do so little to protect the "free will" of persons in custody.¹⁷³ But the warnings have contributed generally to a more humane police culture, and they surely impose some limits on police tactics in specific cases.¹⁷⁴ The reading of rights affects the questioner, even if it glances off the suspect. Only a corroded conscience could live with reading the *Miranda* card by the glare of the arc lamp. And the law-abiding police interrogator must tread rather lightly; too much pressure and the suspect may invoke the right to counsel.¹⁷⁵

Miranda does cut off interrogation in some instances when the police might have elicited evidence without brutality. The common practice of secret questioning, however, fully justifies the presumption that without warnings a confession is produced by unlawful methods. But the warnings respond to the problem awkwardly. If a legitimate resolution of the doctrinal problem of fifth amendment compulsion can be found, I would support a rather different prophylactic approach.

Standard police interrogation practices are not fair-minded gambits in a sporting contest, but neither are they anything like the moral equivalent of the rack and the screw. However manipulative, nonviolent questioning does not seem any more coercive than a thorough search of one's home, or more odious than wiretapping. Nor is there anything inherently evil about questioning in privacy, as opposed to secrecy.¹⁷⁶ But before the police subject any person to questioning, they ought to

173. For a review of the empirical evidence, see Dripps, *supra* note 68, at 722 n.91; see also SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE SECTION, ABA, CRIMINAL JUSTICE IN CRISIS 28-29 (1988).

174. We know, for example, that in both *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Michigan v. Mosley*, 423 U.S. 96 (1975), the invocation of *Miranda* rights resulted in the prompt, if temporary, cessation of interrogation.

175. See, e.g., *Edwards*, 451 U.S. 477 (1981).

176. On this distinction, see Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21 (1961).

have the obligation of establishing, before a neutral magistrate, probable cause *to interrogate*.

Such an "interrogation warrant" would authorize the detention of the suspect for the purpose of questioning at the station for a limited amount of time, with the interrogation either witnessed by a neutral observer or recorded on videotape. By making interrogation a practice requiring specific judicial authorization, instead of the presumed concomitant of lawful arrest, interrogation would be regulated rather than merely tolerated. Just as with a grand jury, defense counsel would not be permitted to participate. The suspect could be warned of his right to silence, but the revised premises I have endorsed do not require any protection for the suspect's free will as distinct from the infliction of gratuitous suffering.

In short, I propose treating police questioning as a search-and-seizure problem rather than as an entirely distinct police practice. Present law does not require warnings or the presence of counsel before consent to search can be given. Indeed, when the police have obtained a warrant, the individual may not refuse consent, and one who does may be overcome by force and if necessary, by deadly force.

More fundamentally, the evil of coercive interrogation lies not in the discovery of probative evidence but in the use of gratuitously cruel pressures to make the discovery.¹⁷⁷ When police attempt but fail to coerce a confession, their victim has an excessive force claim, not a self-incrimination claim. Even noncoercive questioning can injure the suspect far beyond the injury of arrest itself.¹⁷⁸ Lawful arrest, to be sure, carries with it authority to search, but it does not carry the authority to conduct any search, however intrusive. In *Schmerber v. California*,¹⁷⁹ the Court allowed a warrantless blood test only because of the exigent circumstances presented by the evanescence of the evidence.¹⁸⁰ In *Winston v. Lee*,¹⁸¹ the Court disallowed a surgical search for a bullet in defendant's body even though a state trial judge authorized the

177. See Dripps, *supra* note 67, at 718-23.

178. See the illuminating discussion of *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986) in Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE—CASES, COMMENTS, AND QUESTIONS* 560-70 (7th ed. 1990).

179. 384 U.S. 757 (1966).

180. *Id.* at 770-71.

181. 470 U.S. 753 (1985).

search.¹⁸² Typical custodial interrogation adds at least as much as a blood test to the coercive restraint of arrest. Because the suspect's memory is far less transient than his blood alcohol content, interrogation ought to be authorized independently of the arrest.

The treatment of interrogations as a search and seizure problem would permit the police to question when necessary, but not at whim and not in secret. The doctrinal problem remains, however, and it is a formidable one. If the suspect has the fifth amendment privilege before the grand jury,¹⁸³ there seems no way to deny it at the station house. Warnings might suffice, under current law, to cure the compulsion problem, but some suspects will take advantage of the warning. Certainly defense counsel must be excluded if the interrogation is to succeed. So I continue to believe that rational confessions law awaits the abandonment of the privilege against self-incrimination.

Pending that reform, a search-and-seizure approach to confessions might well improve on *Miranda* by securing more evidence with less hypocrisy and less brutality. But those concerned with official abuse of the innocent will not wage war against *Miranda*. If the alternative to *Miranda* is the old voluntariness test,¹⁸⁴ they will count themselves among *Miranda*'s staunch supporters.

IV. IMPROVING THE PERFORMANCE OF THE TRIAL PROCESS

The intensity of the debate about *Mapp* and *Miranda* calls to mind a professor's favorite epigram, that academic politics are so bitter because the stakes are so small. For every prosecution aborted by the constitutional exclusionary rules, roughly a hundred founder because of numbingly prosaic procedural problems.¹⁸⁵ The guilty go free primarily because

182. *Id.* at 763-66.

183. *See, e.g.,* Counselman v. Hitchcock, 142 U.S. 547 (1892).

184. Sparf v. United States, 156 U.S. 51, 55-6 (1895); *see generally* REPORT NO. 1, PRETRIAL INTERROGATION, *supra* note 41, at 465-71.

185. To paraphrase Eliot, between arrest and conviction falls the shadow. *See* Forst, *Criminal Justice System: Measurement of Performance*, in 2 ENCY. OF CRIME & JUSTICE 479, 481 (S. Kadish ed. 1983) (typical rate of conviction following arrest is 50%); Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 178, at 12 ("In the end, at least as to felonies, the cases against 30-50% of all arrestees will be dropped as a result of such [prosecutorial] screening." (footnote omitted)). There is some debate about whether case attrition results from poor police work and the difference between

justice takes too long and because the witnesses do not testify when the trial finally occurs.¹⁸⁶ Granted that it is easier to talk about constitutional law than it is to talk about bringing order to the South Bronx or East St. Louis, constitutional doctrine poses only one modest hurdle, among many enormous barriers, to the realization of a less violent society.

In this regard the silence of the legal academy is indefensible. Conservatives and liberals alike have little interest in justice as administered. But no matter what vision of a good society or the Constitution one entertains, one would still approve of reforming procedure so as to increase the chances of convicting the guilty *and* reducing the chances of convicting the innocent. A society as thoroughly victimized by transformative politics as any "crit" could wish must enforce criminal laws.¹⁸⁷ As for the conservatives, overruling *Miranda* and repealing the fourth amendment would do almost nothing to reduce the crime rate if justice as administered does not change first.

If those arrested on probable cause faced a trial within six weeks at which the witnesses could testify in safety and with convenience, and from which they could be absent only at

the probable cause standard governing arrest and the reasonable doubt standard governing trial, or instead reflects the police practice of arresting for purposes other than initiating prosecution. See J. PETERSILIA, A. ABRAHAMSE & J. WILSON, *POLICE PERFORMANCE AND CASE ATTRITION* 34-36 (1987). Both explanations surely play some role in the true account of lost arrests, but neither impugns the constitutional exclusionary rules. To the extent arrests are thrown out because the police never intended a prosecution, the exclusionary rules do not deter and, even if they did, they would not prevent any convictions. To the extent that witness problems and insufficient evidence account for lost arrests, the exclusionary rules are not to blame except to the extent that they may deter unconstitutional investigations.

A San Diego study provides a fair measure of the exclusionary rules' relative importance in the overall process of criminal justice. The study revealed that about half of the arrests for selected serious felonies failed to result in a conviction. Of these 885 lost arrests, only 9 were attributed to the exclusionary rules. See Davies, *supra* note 149, at 621 (citing F. FEENEY, F. DILL & A. WEIR, *ARRESTS WITHOUT CONVICTIONS: HOW OFTEN THEY OCCUR AND WHY* (1983)).

186. See, e.g., F. CANNAVALE & W. FALCON, *IMPROVING WITNESS COOPERATION* 8 (1976) (survey of 1,457 felony cases indicates that 23% were not prosecuted because of witness problems); M. GRAHAM, *WITNESS INTIMIDATION* 3-8 (1985); S. MARTIN, *IMPROVING EVIDENCE COLLECTION THROUGH POLICE-PROSECUTION COORDINATION: FINAL REPORT*, at X-3 (1987) ("Studies of the factors that contribute to convictions and conversely to attrition rates overwhelmingly have found that the seriousness of the offense and the availability of physical evidence and witnesses are the primary determinants of case dispositions." (citations omitted)).

187. Indeed, the major charge brought by the radical left against American criminal justice is that the class structure results in *underenforcement* of laws typically violated by businesses. See, e.g., Kelman, *The Origins of Crime and Criminal Violence* in *THE POLITICS OF LAW* 218, 221-22 (D. Kairys ed. 1982).

substantial cost, there would be no pressure to overrule the Warren Court precedents. Instead, there would be a crisis in our correctional system that would compel America to think about reducing prison sentences to the levels prevailing in other Western societies. Such a flood of convictions might even cause the sober reexamination of a drug policy animated by illusions more bizarre than any narcotic can induce.

Experienced observers might say that speedy trial is impractical. Yet the constitutional minima for a criminal trial are surprisingly informal. A jurisdiction that chose to punish nonhomicidal street crime solely on a misdemeanor basis could try complaints, punishable by six months in jail, without a jury and without appeal.¹⁸⁸ Indeed, the trial of such a charge need be no more formal than the preliminary hearing as presently conducted in many jurisdictions.¹⁸⁹ Yet from the standpoint of defendants, such a system would provide far more procedural protection than does plea bargaining, as much "procedure" as most defendants ever see.¹⁹⁰

As for obtaining the appearance of witnesses, the first step would be to establish confidence that trial will take place on a scheduled date. The second would be to make witness intimidation one of the most serious felonies on the books. Third, it would be appropriate to compensate witnesses realistically for the value of their time (which might of itself spur greater reliability in trial scheduling). Witnesses who refuse to testify should be subjected to some sort of meaningful sanction.

Administrative overhaul of the criminal justice system poses a daunting political challenge. In the absence of some such overhaul, however, efforts to increase the conviction rate of the

188. See *Blanton v. City of North Las Vegas*, 109 S. Ct. 1289 (1989) (no constitutional right to jury trial for DUI charge carrying maximum of six months in jail); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (dictum) (no constitutional right to appeal); *McKane v. Durston*, 153 U.S. 684, 687 (1894) (same).

189. In California, plea bargaining frequently has taken the form of an agreement to try the case on the cold record of the preliminary hearing. See A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 166 (1976).

190. Lloyd Weinreb has written:

The assertion that a plea of guilty is the defendant's independent choice is valuable to us because it protects the myth of an adversary trial process, which does not survive frank recognition that most of the time the only "defense" is a quick, informal exchange between the prosecutor and defense counsel. To say that the defendant chooses to forgo the trial that would normally be his and the prosecutor, honoring the defendant's responsible freedom, accepts his choice is comforting but false.

L. WEINREB, *DENIAL OF JUSTICE* 79 (1977).

guilty have only remote chances of success. Yet if such major reforms are prerequisites for any significant increase in the number of guilty persons convicted and punished, they are not essential for steps that might help reduce the number of innocent persons convicted and punished. Even within the parameters of justice as presently administered, the risk of unjust conviction might be reduced significantly.

Unfortunately, law enforcement agencies could support such reforms in trial procedure only by recognizing that these very agencies sometimes prosecute innocent persons. If criminal-law professionals, in government and academia, seem indifferent to the conditions that permit the escape of the guilty, there seems little interest in the academy, and none outside of it, in the circumstances that permit the punishment of the innocent. Perhaps this is why the Constitution commands some protection for the innocent, but does not facilitate, much less mandate, the punishment of the guilty.

Consider, for example, the Justice Department's proposal to permit the use of prior convictions as evidence of guilt.¹⁹¹ The Report's authors point out that juries would consider such evidence relevant, that a number of logical arguments support inferring guilt from prior crime, and that prior convictions contribute routinely to the decision to arrest before, or to incarcerate after, conviction.¹⁹² But all these arguments depend on the assumption that the discovery of truth is an unqualified good. The Department's proposal would contribute only marginally to convicting the guilty, but it might contribute substantially to convicting the innocent.

The very primacy of prior criminal activity in the decision to arrest and to charge warrants disregarding it at the trial stage. Requiring the government to adduce a different kind of proof at trial to corroborate its arrest decision reduces the danger of convicting the innocent person with a criminal record, who might otherwise be arrested, charged, convicted, and sentenced based on nothing more than a record and the absence of an alibi.

As for the various logical arguments that might justify inferring guilt from prior convictions, the important point is not that logical arguments support this inference but that two illogical arguments also support it.¹⁹³ The jury might use

191. See REPORT NO. 4, CRIMINAL HISTORIES, *supra* note 44, at 757.

192. *Id.* at 725.

193. These concerns are prominent enough to enter into hornbook law. See MCCORMICK ON EVIDENCE § 43, at 99 (E. Cleary ed. 1984) ("[T]here is an obvious danger that the jury, despite instructions, will give more heed to the past convictions

the prior conviction as evidence of the defendant's criminal character, and reason from a supposed propensity to commit crimes in general to a conclusion about the crime charged in the indictment. Perhaps more insidious is the risk that juries will infer from the prior crimes that the defendant is a bad person who deserves more punishment for his prior crimes, despite inconclusive evidence supporting the crime charged.

Given a desire to find truth at trial, qualified by the preference for avoiding unjust conviction, the use of prior convictions deserves serious reconsideration. The most plausible option, however, is not permitting the use of prior convictions as substantive evidence, but prohibiting the use of prior convictions to "impeach" the defendant who takes the stand. If cross-examination does not shake the defendant's story without the prior convictions, the convictions will do more harm than good. In such a case, they stand as weak and isolated reasons to disbelieve the defendant's story, but as powerful reasons for the jurors to decide the case on grounds other than the evidence and the law.¹⁹⁴ Worse yet, the availability of prior convictions for impeachment purposes may deter the defendant from testifying altogether. In such a case, the threat of marginally relevant evidence drives out centrally relevant evidence, a perverse legal variation on Gresham's law.

More disappointing than what the Justice Department reports include is what they omit. There is no Report on administrative reform of the trial process, on witness problems, on identification testimony, or on new forensic techniques such as genetic identification. Nor do any of the

as evidence that the accused is the kind of man who would commit the crime on charge, or even that he ought to be put away without too much concern with present guilt, than they will to the legitimate bearing of the past convictions on credibility."). These fears have some grounding in the empirical evidence. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 161 (1966) ("[I]f we take the average of the cases where the defendant has no record [or refuses to take the stand] as against the cases where he has a record, the acquittal rate declines from 42 to 25 per cent.").

194. No one, I suppose, would consider a government witness's criminal record, however profligate and vicious, as a reason to direct a verdict for the defense even if the government's case depends on his testimony. See, e.g., *United States v. Cravero*, 530 F.2d 666, 669-71 (5th Cir. 1976). In *Cravero*, the government's witness, Lipsky, admitted committing theft, narcotics use and trafficking, abetting a "particularly brutal" murder, perjury, and forgery of his own mother's name on checks. *Id.* at 669. The court nonetheless held that his testimony was sufficient to go to the jury. Indeed the court noted that "[i]n fact, Lipsky's testimony has been believed by other juries even after having been subjected to generally the same impeachment on cross-examination." *Id.* at 670 n.7. If prior convictions had a generalizable and substantial effect on credibility, we would expect that in at least some cases their existence would enter into the decision to direct a verdict.

Reports address racism in the administration of justice, the competence of appointed defense counsel, or police perjury.

It would be unfair to charge the Justice Department, or conservatives generally, with a monopoly on indifference to serious reforms of the trial process. There is no shortage of liberal law professors passionately opposed to the death penalty who are quite blasé about how many innocent persons may be serving life sentences. Indeed, when the charge is sexual assault it is hard to find a law professor with bad things to say about convicting the innocent. The conservatives, however, hold power, and their notions of reform therefore deserve somewhat more rigorous scrutiny than does the agenda of their tireless antagonists.

Although the prospects for convicting more of the guilty remain quite limited, present institutions could easily assimilate some modest additional checks on the risk of convicting the innocent. One is the application of the reasonable doubt standard to affirmative defenses.¹⁹⁵ A second is automatic admission of expert testimony on the inaccuracy of eyewitness identification in any trial at which the government relies primarily on such identifications.¹⁹⁶ These reforms would cost little or nothing. From a policy perspective that emphasizes the prevention of unjust convictions, the case for these reforms is overwhelming.

A third reform may be costly but is too promising to put off: developing the competence to discover, preserve, and test tissue samples for genetic matching with potential suspects.¹⁹⁷ No scientific test can provide reliable results from

195. See Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665 (1987).

196. See MCCORMICK ON EVIDENCE, *supra* note 193, § 206, at 624-25. There is a substantial body of case law upholding trial court rejections of proffered expert testimony on this issue. One of the richer ironies in the literature of criminal justice is that "some well publicized cases of mistaken identification in the early 1970's" include some of "those which established precedents for excluding expert testimony." Loftus & Schneider, "*Behold With Strange Surprise*": *Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability*, 56 UMKC L. REV. 1, 4 & n.15 (1987) (citing *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973)). The recent trend seems to be in the direction of requiring admission of expert testimony. See *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. MacDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

197. Until recently, the accuracy of the DNA fingerprinting technique was unquestioned. See, e.g., *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E. 2d 785, 797 (1989), *cert. denied*, 110 S. Ct. 1171 (1990). But some experts have expressed reservations. See Thompson & Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45 (1989); Kolata, *Some Scientists Doubt the Value of 'Genetic Fingerprint' Evidence*, N.Y. Times, Jan. 29, 1990, at A1,

an unreliable sample; nor can any test match a sample from the crime scene to a person with no other sample on record. DNA testing has the potential not merely to convict the guilty, but to clear the innocent conclusively of charges that might otherwise go to trial and perhaps to sentencing. When this potential is realized, liberals and conservatives will have something to celebrate in common.

V. CONCLUSION

In discussing the liberal and conservative approaches to constitutional criminal procedure, I have aimed less at critique than at reconstruction. If the conservative assumption about truth-finding is modified as I propose, the liberal constitutional doctrines for the most part serve a justifiable policy program. Whether principled constitutional interpretation can reach that result is another question. The Warren Court cases are now settled precedents, however, and only an originalism out of step with the rest of our constitutional law could justify discarding them completely.

Indeed, principled constitutional interpretation yields a regime committed to preventing unjust punishment more easily than it yields either the conservative abdication to legislative will, or the Warren Court's romantic devotion to equality and autonomy. At least this is so when we remember that the fourteenth amendment's due process clause generates all of this constitutional law. Fairly read, that clause provides that the burdens on individuals required by law enforcement must bear a reasonable relation to an impartial decision-maker's confidence of guilt. This reading suggests a unified constitutional theory of police practices and trial procedure, a theory concerned primarily with guilt and innocence, and for that reason broadly consistent with the results of the Warren Court criminal procedure landmarks.

col. 1. The cited problems include the instability of the bands yielded by the test, the difficulty of measuring the differences between the bands, and the challenge of expressing the exclusionary power of the test in statistical terms. These problems are serious, and their identification in a newspaper article after DNA evidence has helped convict hundreds of defendants gives no credit to the defense bar. Nonetheless, it should be possible to monitor the accuracy of test results by continuously testing samples from known sources. So long as the labs do not report unequivocal false positives, the technique's accuracy would seem reliable enough to count as a major advance in forensic science.